UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: James V. GUIZZOTTI 207 500

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2497

James V. GUIZZOTTI

This appeal has been taken in accordance with 46 U.S.C. SS7702 and 46 CFR SS5.701.

By his order dated 14 September 1988, an Administrative Law Judge of the United States Coast Guard at Seattle, Washington, revoked Appellant's Merchant Mariner's License upon finding proved the charge of misconduct. The single specification supporting the charge of misconduct alleged that, on 1 September 1987, ,Appellant, while serving as Operator aboard the M/V ROSE under the authority of his above-captioned license, did wrongfully rape a passenger while on board the vessel at Vancouver, Washington.

The hearing was held at Portland, Oregon, on May 10, 1988. Appellant was represented by professional counsl and introduced two exhibits into evidence as well as the testimony of one witness. Appellant entered a response of DENIAL to the charge and specification as provided in 46 C.F.R. SS5.527. The Investigating Officer introduced seventeen exhibits that were received into evidence. Three witnesses testified at the request of the Investigating Officer. The Administrative Law Judge's final order revoking all of appellant's licenses and documents was entered on 14 September 1988. An order authorizing issuance of a temporary license to Appellant to serve on non-passenger carrying vessels was entered 22 September 1988.

The Appellant filed a notice of appeal on 19 September 1988 pursuant to 46 C.F.R. SS5.703. At Appellant's request, a transcript was prepared. Appellant filed his brief with the Commandant on 18 January 1989, perfecting his appeal pursuant to 46 C.F.R. SS5.703(c).

Appearance: G. Kirk Greiner, Esq., 3107 NE 160th Street, Ridgefield, Washington 98642.

FINDINGS OF FACT

On 1 September, 1987, Appellant was the holder of Merchant Mariner's License No. 207500, authorizing him to serve as Operator of a mechanically propelled passenger carrying vessel not more than 100 gross tons, limited to the Atlantic Ocean and Gulf of Mexico, not more than 50 miles offshore between Melbourne and Hudson, Florida. Consistent with 46 C.F.R. 10.401, said license authorized Appellant to serve in the same grade on the inland rivers without further endorsement.

The M/V ROSE, O.N. 642183, is a 46 gross ton inspected small passenger vessel, 51.7 feet in length, owned by Oregon Steam Navigation Company. In accordance with its Certificate of Inspection, the vessel is required to be manned by one licensed operator when carrying 15 or fewer passengers on the Columbia River for not more than 12 hours in any 24 hour period. (C.G. Ex. 5).

On 1 September 1987, Appellant was ordered by the vessel owners to shift the M/V ROSE from Portland, Oregon, to Vancouver, Washington, on the Columbia River, so that the vessel would be available the next day for a charter party.

Appellant invited a young woman, whom he had met the previous week when she rode on board the vessel as a passenger, to accompany him, alone, on the voyage to Vancouver. She agreed. After the vessel had arrived in Vancouver and been tied up at the pier, Appellant raped the young woman in the pilot house. She was eventually able to depart from the vessel and hide on the pier over night under a tarp. Early the next morning, she located a nearby telephone and called the Vancouver police, who responded to the scene.

Appellant was arrested and convicted of third degree rape in a jury trial in Clark County, Washington, Superior Court. The judgment of conviction is now on appeal to the Washington State Court of Appeals.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. On appeal, Appellant asserts that:

(1) The vessel was being operated in fact as an uninspected vessel carrying no passengers on the night in question, and, therefore, no licensed operator was required, Appellant was not acting under the

authority of his license, and the Coast Guard has no jurisdiction to proceed against his license.

(2) The Coast Guard lacks jurisdiction to proceed against Appellant's license since the vessel was not underway and "in operation" at the time of the alleged misconduct.

(3) The Coast Guard lacks jurisdiction to proceed against Appellant's license since his employer did not require that he hold such license as a condition of employment.

(4) The Administrative Law Judge erred in admitting certain hearsay evidence that was not properly authenticated.

OPINION

I

A license may be suspended or revoked for misconduct only if the holder was acting under the authority of the license at the time of the alleged misconduct. 46 U.S.C. 7703. A perso is considered to be "acting under the authority of a license . . . when the holding" is required by law or regulation or is required by an employer as a condition of employment. 46 C.F.R. 5.57.

Pursuant to the hearing below, the Administrative Law Judge ruled that Appellant held his license on the night of the incident under compulsion of law. Appellant argues this was error.

It is undisputed that the M/V ROSE was customarily employed as an inspected small passenger vessel within the meaning of 46 U.S.C. 2101(35) and had been issued a Coast Guard Certificate of Inspection pursuant to 46 U.S.C. 3309 (see C.G. Ex. 5). Consistent with 46 U.S.C. 8902, the Certificate of Inspection expressly provided for a specified crew complement, including one licensed operator when the vessel was operating not more than twelve hours in any 24-hour period with 15 or fewer passengers on board.

Appellant maintains that, on the night in question, the M/V ROSE was being employed in fact in a lesser capacity as an uninspected vessel, for which no licensed operator is required. By regulation, an inspected small passenger vessel may be operated by a person with no license if the vessel is actually being employed as an uninspected vessel carrying no passengers. Title 46 C.F.R. 176.01-1 provides, in pertinent part:

(a) Except as noted in this subpart, every vessel subject to inspection and certification shall, when carrying more than six passengers, have on boarda valid certificate of inspection, Form CG-3753, and shall be operated in compliance therewith.

(b) Every mechanically propelled vessel of above 15 gross tons inspected and certificated under the provisions of this subchapter shall, during the tenure of the certificate, be in full compliance with the terms of the certificate when carrying freight for hire. Any other vessel certificated under the provisions of this subchapter when carrying not more than 6 passengers, and when operating as a yacht, commercial fishing vessel, cargo carrier, etc., will be subject only to the laws, rules and regulations governing the type of operation in which it engages.

Appellant concludes that he could not have been acting under the authority of any license whatsoever since there are no laws, rules and regulations requiring a licensed operator for the M/V ROSE while carrying himself and his guest, the victim.

The Administrative Law Judge found two fallacies in Appellant's reasoning. First, consistent with 46 U.S.C. 3313(a), the M/V ROSE was required to remain in strict compliance with the conditions of its Certificate of Inspection, including the condition that a licensed operator be employed on board. In the Administrative Law Judge's view, 46 U.S.C. 3313(a) and 46 C.F.R. 176.01-1(b) are in irreconcilable conflict, and, in such case, the statute, 46 U.S.C. 3313(a), must be obeyed as superior authority.

I agree that the statute and regulation are inconsistent. The povision allowing a certificated small passenger vessel of not more than 65 feet in length to operate as an uninspected vessel has been in 46 C.F.R. Subchapter T since the regulations were first promulgated in 1957. There is no existing law to support it. For this reason, efforts are underway to eliminate the inconsistency. In a Notice of Proposed Rulemaking, published on 30 January 1989, (54 Fed. Reg. No. 18 pp. 4424, 4472, (to be codified in 46 C.F.R. 176.114) pertaining to overall revision of Subchapter T, 46 C.F.R. 176.01-1(b) would be replaced with a rule allowing issuance of an endorsement to the Certificate of Inspection that would permit minimum manning restrictions where a small passenger vessel is carrying six or fewer passengers. This proposal continues to be evaluated.

Due to the maritime industry's long term reliance on 46 C.F.R.

176.01-1(b), I believe that this regulation cannot be disregarded without appropriate notice to the public through the rulemaking process. I have therefore adopted a temporary policy of not taking action against vessel owners or licensed personnel that would be inconsistent with this regulation pending the outcome of such rulemaking procedure.

Therefore, I disagree with the Administrative Law Judge's Decision to the extent it is inconsistent with the foregoing, and I decline to assert jurisdiction over Appellant on the basis of strict compliance with 46 U.S.C. 3313(a).

However, this does not end the matter. As the Administrative Law Judge correctly determined, the M/V ROSE was not beng operated simply as an uninspected vessel on the night of the incident. The rape victim qualified as a "passenger" on an "uninspected passenger vessel" under 46 U.S.C. 2101(21) (D)(iv) since she was "an individual on board a vessel that is being operated only for pleasure who has not contributed consideration for carriage on board." The victim did not fit the "guest" category because the vessel was being operated for the business purposes of the owner and Appellant was on board solely because of his employment position. The evidence is clear that the employer did not give Appellant the use of the vessel for the evening for recreational purposes. When the purpose of a voyage is business, then individuals on board qualify as passengers, not guests, even if they pay no consideration for the ride. Decision on Appeal No. 2363 (MANN).

Given that the vessel was carrying a passenger rather than a guest, it qualified as an "uninspected passenger vessel" within the meaning of 46 U.S.C. 2101(42), and it required a licensed operator, 46 U.S.C. 8903; 46 C.F.R. 10.466. Appellant was, therefore, acting under the authority of a license required both by law and regulation at the time and was, again, subject to Coast Guard jurisdiction for these administrative proceedings pursuant to 46 C.F.R. 5.57.

II

Appellant argues both here and below that a vessel must be in operation in order for the Coast Guard to assert jurisdiction over licensed mariners on board and that a vessel tied up at the dock is not in operation. To suppot his theory, Appellant's brief cites 46 U.S.C. 3311, which provides that a vessel subject to inspection may not be operated without having a certificate of inspection on board. Appellant suggests that the inverse of this proposition be read into

the statute, that a certificate of inspection cannot be required when the vessel is not being operated. However, appellant's theory stretches the statute too far.

Appellant also maintains that the Certificate of Inspection, which provides for "route permitted and conditions of operation," refers to operation "underway or when passengers for hire are on board..." (Appellant's Brief, p.5). However, Appellant cites no authority for this limited construction of the term "operation."

In fact, a vessel may be "in operation" or "in navigation" even when tied up at the dock. United States v. Mostad, 134 F.2d 986 (9th Cir. 1943). Congress clearly intended for vessel operation to be construed in Subtitle II of Title 46 United Stated Code to include "all operations of a vessel when it is at the pier, idle in the water, at anchor, or being propelled through the water." 1983 U.S. Code Cong. and Adm. News, p. 924, 933.

There is no jurisdictional prerequisite that a vessel be underway before the Coast Guard can act against licensed personnel who are both on board and have affirmative duties to perform that are within the scope of their licenses. Here, notwithstanding that the vessel was moored and that Appellant supposedly had signed off the log for pay purposes, Appellant, as operator, remained responsible for the welfare of is passenger. He may not intentionally shut down his vessel, turn his license to the wall, rape a passenger, and then argue that a vessel must be underway in order for the Coast Guard to assert jurisdiction over his license. Agreement with such a policy would give many seamen the unfettered discretion to police their own licenses.

In addition, a licensed operator cannot disregard his duties to passengers simply because the vessel is idle at the pier. "A carrier is bound to exercise the highest degree of care and diligence in providing for the safety of its passengers." ANTILLES, 1975 A.M.C. 1159, 1163, 392 F. Supp. 973 (D.P.R. 1975). Footnote 9 in ANTILLES lists the cases so holding:

Liverpool and Great Western Steam Co. v. Phoenix Ins. Co., 129 U.S. 397, 400 (1889). Other courts have used various language in imposing similarly high standards: Pennsylvania Co. v. Roy, 102 U.S. 451, 456 (1880), Stokes v. Saltonstall, 38 U.S. 181, 191 (1839) (duty to transport passengers safely, "as far as human care and foresight can go"); Allen v. Matson Navigation Company, 1958 AMC 1343, 1348, 255 F.2d 273, 277 (9 Cir., 1958) ("extraordinary vigilance

and the highest skill"); Moore v. American Scantic Line, 1941 AMC 1207, 121 F.2d 767, 768 (2 Cir., 1941) ("as much skill, care and prudence as an exceedingly competent and cautious man would bring to the task in like circumstances"); Kitsap County Transp. Co. v. Harvey, 1926 AMC 1657, 1659, 15 F.2d 166. 167 (9 Cir., 1926) ("high degree of care"); Gardner v. Panama Canal Co., id. 1953 AMC at 1536, 115 F.Supp. at 691 (quoting Robinson: "very hig degree of care, prudence and foresight"); Arabic, 1929 AMC 1364, 34 F.2d 559, 562 (S.D.N.Y., 1929) ("highest degree of care").

Thus, the fact that the M/V ROSE was idle at the pier does not interfere with Coast Guard jurisdiction over Appellant's license.

III

There is evidence here that Appellant's employer required Appellant to have a Coast Guard license as a general condition of employment but that, on a past occasion, the employer had permitted an unlicensed operator to operate the M/V ROSE when carrying no passengers.

Appellant argues that 46 C.F.R. 5.57(a)(2) should be construed to confer jurisdiction over a mariner's license only when the employer requires the license as a prerequisite for performing the specific task or function being undertaken by him or her at the time of the alleged misconduct. An alternative construction would confer jurisdiction where, in a general sense, the employer conditions the initial hiring and continuous employment on holding a license, without regard to what particular task the individual is performing at any given time.

Having found above that the Appellant's license was required by law and regulation and that he was therefore considered to be acting under its authority in accordance with 46 C.F.R. 5.57(a)(1), thereby conferring jurisdiction on th Coast Guard, there is no need for me to consider the presence or absence of a second ground for jurisdiction pursuant to section 5.57(a)(2).

IV

The evidence of misconduct consists of the Clark County judgment of third degree rape (C.G. Ex. 11), the Vancouver County police report (C.G. Ex. 10), the police tape recording of the victim's call to the police reporting the alleged rape (C.G. Ex. 9), the transcript of the victim's sworn testimony at the criminal trial (C.G. Ex. 13), and the

testimony of a Vancouver, Washington, police officer who responded to the victim's telephone call for assistance after the rape.

On appeal, Appellant does not complain about admissibility of the judgment. Indeed, while that judgment is not conclusive evidence of the issue of rape, it is admissible and "constitutes substantial evidence adverse to respondent." 46 C.F.R. 5.547. Appellant did not testify himself about the circumstances that occurred on the night of the alleged rape (See Tr. p. 90) and offered no evidence to rebut the judgment of conviction.

Appellant does assert that it was error to admit the tape recording of the victim's telephone call to the police and the transcript of her testimony at the criminal trial. Objections are based, variously, on authenticity and hearsay. The Administrative Law Judge overruled these objections, in my opinion correctly.

Te trial transcript was admissible as an exception to the hearsay rule since Appellant had adequate opportunity to develop cross-examination of the victim at the criminal trial. Federal Rule of Evidence 804(b)(1).

The victim's unavailability to testify at the administrative hearing was substantiated by a letter from her doctor. Appellant complains that this letter was hearsay and that the doctor should have been required to testify live to his opinion that the victim's testimony was "contraindicated" due to the "emotional trauma of the situation".

Rigid rules of evidence do not apply in administrative proceedings. Decision on Appeal No. 2298 (GRAVES). It was within the discretion of the Administrative Law Judge to rule the doctor's letter admissible and take the contents to be true.

Appellant argues that the Coast Guard failed to tender the tape recording of the victim "under seal" and that it was therefore not properly authenticated. However, submission under seal is only one of many ways to authenticate evidence. Here, the recording was of a conversation between a person identifying herself as the victim, by name, and a police dispatcher. The conversation described the events of the alleged rape with details that were wholly consistent with the victim's criminal trial testimony as well as with the police report and the live testimony at the administrative proceeding of the Vancouver police officer who responded to the call. This constitutes "evidence sufficient to support a finding that the mattr in question

is what its proponent claims," Federal Rule of Evidence 901(a), especially since it has "internal patterns, or other distinctive characteristics, taken in conjunction with circumstances" described in other clearly admissible evidence. I agree with the Administrative Law Judge that the tape recording was authentic and admissible.

In his brief, Appellant complains that:

Prior to the opening of the hearing, Appellant asked the Administrative Law Judge to rule that if he took the stand, cross examination would be limited to matters brought forth on direct. The court, referring to an unnamed Commandant's decision, stated that cross examination would not be so limited. The Appellant therefore did not testify because his criminal conviction is still being appealed.

Appellant has no basis for appeal of this alleged error. He failed to seek a ruling during the hearing and there is no record entry as to this alleged pre-hearing discourse. Indeed, at the close of his case, Appellant's counsel stated to the Judge: "I'm going to make your day, your Honor. I'm not going to call any witnesses. (laughter)." [Tr. p. 90]. Issues outside the record will not be considered on appeal.

Appellant also urges that the Administrative Law Judge's Decision be set aside on the grounds that the criminal case is still pending in an appellate court for the State of Washington and may be reversed in his favor. A reversal could indeed impact this administrative proceeding if the conviction wereset aside for all purposes. Decision on Appeal No. 2285 (PAQUIN). In such case, a motion filed before the Administrative Law Judge in accordance with the procedure set forth in Federal Rule of Civil Procedure 60(b) would suffice to reinstate this matter on the docket.

CONCLUSION

Having reviewed the entire record and considered Appellant's arguments, I find that Appellant has not established sufficient cause to disturb the findings and conclusions of the Administrative Law Judge. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The decision and order of the Administrative Law Judge dated 14 September 1988 at Seattle is AFFIRMED.

CLYDE T. LUSK, JR
Vice Admiral, U.S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this 10th day of April 1990.

1. ENABLING AUTHORITY

1.02 Administrative Procedure Act
CG administrative proceedings governed by

3. HEARING PROCEDURE

3.39 Discovery
not generally available as of right in administrative proceedings

3.44 Due process
denial of, not shown
no denial for curtailment of irrelevant direct examination

3.47.5 Evidence
evaluation of, duty of ALJ

3.64 Jurisdiction

***** END OF DECISION NO. 2497 *****